

Subject: Prohibited Source -- Dirty Word? No!

Recently, an official of an Army affinity organization called me, because he was very concerned that his PO might be doing something "terrible." His PO was considering competing for an AMC contract, but wouldn't this make his PO a (shudder, grimace) "prohibited source?" He was really concerned that his PO might be doing something "dumb" that would adversely affect its relationship with the Army.

I explained what it meant to be a "prohibited source," that his PO and its various chapters were probably "prohibited sources" at least occasionally, but, it doesn't really mean much to the PO, rather it is a concept that helps define employee conduct. He then sent me an e-mail asking for an AMC opinion as to what this would mean if his PO bid on and entered into this contract. Here is what I responded.

"First, not being the PO's lawyer, I cannot provide you an opinion concerning how the PO may or may not be affected by its initiatives, e.g., bidding on an Army (USASAC) IDIQ contract and becoming a USASAC contractor for 5 years. However, what I am willing to do is to explain my view, as an AMC ethics official, of what a "prohibited source" means to Army/AMC/USASAC employees. After all, the rules proscribe and circumscribe EMPLOYEE conduct, not yours or the PO's.

"As I mentioned to you on the telephone, "prohibited source" is not a dirty word. It's just a fact. Either you are doing business with the Army, trying to do business with the Army (e.g., submitting a proposal), or seeking some other official action from the Army (e.g., support to a PO event), or not.

"Usually, professional organizations (POs) like your PO are "prohibited sources" on an intermittent basis. They are not like a company like General Dynamics who is constantly marketing, offering, and under contract to the agency, and always a prohibited source. But, from time to time, POs will also be "prohibited sources." If your PO should sign a 5 year IDIQ contract, your PO will be a "prohibited source" from the time that it starts to participate in the solicitation process; if your PO receives the award, then it will also be a "prohibited source" for during these five years.

"I also mentioned that I usually view the individual chapters separately among themselves and as between them and their parent. Therefore, even though the Huntsville chapter, for example, might be a "prohibited source" this month because of some event or purchase order, that does not make the other chapters or the parent also "prohibited sources." Similarly, if the parent is involved with some Army organization this month, this by itself does not make all the other chapters also "prohibited sources."

"What does it mean to your PO to be a "prohibited source"? Like I said, I cannot provide you legal advice. But, I can tell you how it affects the employees I advise, and indirectly that tells you what it means to your PO. A number of the Standards of Ethical Conduct and related rules in the Joint Ethics Regulation specifically refer to "prohibited sources." For example:

1. Employees may not accept gifts from "prohibited sources," except for those gifts that fall within one of the exceptions. But, it does not usually matter whether the source of the gift is a "prohibited source," because the other half of the rule is that employees will not accept gifts that are given because of their official position. Even though the gift might not be coming from a "prohibited source," it will still be prohibited (unless it falls into one of the exceptions) if it is offered because of the employee's official position. However, like I said, there are a couple of narrow exceptions that do not apply if the giver is a prohibited source; in such a case, it would make a difference to the employee as to whether he or she could accept the gift. But, this does not happen often.

2. Employees who file financial disclosure reports must obtain the prior approval of their supervisors or commanders before they can engage in compensated off-duty activity with a prohibited source. This does not apply to volunteer work. Even if the entity providing the compensation is not a prohibited source, there could be additional requirements because of readiness or security concerns. Even if the employee does not have to obtain prior approval, the employee must still report his or her position with, and source of income from this organization on his or her financial disclosure report.

"These are two examples that come to mind. You will note that, to the extent that there is any impact, it's on the employee.

"What if a commander is considering support to a PO event, such as providing a speaker? What if this same person is considering co-sponsoring an event with the PO? The criteria set out in the Joint Ethics Regulation are no different whether or not the PO is a "prohibited source." The Commander cannot approve the support or co-sponsorship, for example, if it will interfere with mission, if the event is priced so as to generate a profit, if it is not in our interests, and if we don't get the "bang for the buck" (a benefit commensurate with the time, effort and expense put into the support). Whether the requesting PO is a "prohibited source" is not a criteria. What could make a difference is if the PO is not tax exempt under 501(c)(3), or is a for profit organization.

"As a final point, here is a link to a recent DoD General Counsel memorandum about DoD employee serving as advisors to DoD contractors. I provide the link for your information although most of the principles set out herein are true whether the organization is a contractor (or prohibited source) or not.

http://www.defenselink.mil/dodgc/defense_ethics/index.html

"I hope that his helps explain what "prohibited source" means to Federal employees and their ethical conduct."

I believe it entirely proper to provide information like the above to POs. I know of instances where ethics officials have gone to PO Board meetings to provide information on the ethics rules. Indeed, it is in our interest to do so. But, be careful. We cannot become advisors to the POs. There is a line that we must watch for and not cross. After providing the above response to the PO in question, the PO official asked me to meet with him and another senior official in the PO so that they could ask me some more specific questions, to include specifically how the ethics rules will affect the PO in its work with the Army, especially at various meetings and symposia that it hosts. Here is what I answered:

"I'm sorry, but I must decline.

"I have already tried to explain what the concept of "prohibited source" means to Federal employees and how it fits into their Standards of Ethical Conduct. I also mentioned in our telephone conversation that these are the views of an AMC ethics official. I am no longer in the Army Standards of Conduct Office and cannot speak for them.

"To now meet to go into more detail and to discuss "how the rules will affect [your PO] in work with the Army on the your meetings, symposia, etc." would exceed my charter. Additionally, it would put me in the awkward position of providing advice and counsel to your PO with respect to these matters. Even though we are not adversaries, this could well conflict with my fiduciary duty to my client, the Army.

"I suggest that the best way to pursue this further, is with Mr. Al Novotne or COL Mike Schneider of the Army Standards of Conduct Office. Ideally, to avoid conflicts, you might have your PO counsel contact one of them to discuss the issues, and then your counsel can advise you on how best to proceed.

"I am sorry that I cannot be more responsive; but, I believe that this is the correct response. I hope that you understand. "

The PO response was understanding and positive.

Mike Wentink